BEFORE THE FAIR POLITICAL PRACTICES COMMISSION

In the Matter of:	)	
	)	No. O-04-103
Opinion requested by	)	June 25, 2004
A. Lavar Taylor	)	
	)	
	)	

BY THE COMMISSION: A. Lavar Taylor, an attorney in private practice who was an unsuccessful gubernatorial candidate in the October 7, 2003 special election, has requested exemption from the Act's general requirement that a candidate disclose every source of income on his Statement of Economic Interests, Form 700. Under procedures established by regulation 18740, we treat this inquiry as a request for an opinion of the Fair Political Practices Commission (the "Commission") on the following question:

I. Question

May Mr. Taylor decline to identify on his Statement of Economic Interests certain specific clients of his wholly owned law firm on the ground that attorney-client privilege, as recognized by California law, permits or requires him to do so?

II. Conclusion

Yes. In light of all the circumstances, Mr. Taylor has established sufficient cause for the exemption he seeks from the disclosure requirements of Government Code section 87207(b)(2).

III. Facts Presented

We preface our account of the facts provided to us by emphasizing that the Commission is not a finder of fact and must accept as accurate, for purposes of this opinion, the facts presented to us by Mr. Taylor.[1]

A. Lavar Taylor is a former Assistant U.S. Attorney (Tax Division) now in private practice, specializing in civil and criminal tax controversies. Mr. Taylor was a candidate for Governor in the October 7, 2003 statewide special election. On August 6, 2003, he filed a Statement of Economic Interests, Form 700, as required by his candidacy. He did

[1] The Commission does not act as a finder of fact when it issues legal opinions. The opinion is applicable only to the extent that facts provided to us are correct, and that all of the material facts have been provided. (*In re Oglesby* (1975) 1FPPC 71, p. 7, n. 6.) This opinion is based on facts cited in Mr. Taylor's Statement of Economic Interests filed on August 6, 2003, in his letter of November 18, 2003 in response to a request for further information by the Commission's Executive Director, and in a subsequent telephone conversation with FPPC staff.

not win office in this election, and is not a public official by reason of any other election, appointment, or employment. In his Form 700, Mr. Taylor failed to disclose clients of his wholly owned law firm as sources of income, attaching a statement asserting the attorney-client privilege in explanation for this nondisclosure.

Following Commission procedure, the matter was presented to the Executive Director as an exemption request. On October 27, 2003, the Executive Director sent a letter to Mr. Taylor requesting further information, as permitted by regulation 18740, which governs such proceedings. On November 18, 2003, Mr. Taylor responded, abandoning the claim of privilege as to nine clients, but specifically asserting the privilege on behalf of fourteen others. In summary, Mr. Taylor stated that because his law practice specializes in "tax controversies," identification of these particular clients would alert taxing authorities to compliance "problems" that might subject them to civil or criminal investigation or prosecution, and might subject Mr. Taylor to civil liability for unauthorized disclosure of client confidences under specific provisions of 26 U.S.C. sections 6103 and 7431.

In pressing his claim for exemption, Mr. Taylor affirms that he had not and would not make, participate in making, or in any way use an official position to influence a governmental decision in violation of Government Code section 87100. On May 7, staff spoke with Mr. Taylor by telephone, and he verified that he was not in any capacity a "public official" as defined by Government Code section 82048.

IV. Analysis

Mr. Taylor's request for exemption from the Act's requirement that candidates and public officials disclose their financial interests touches on one of the Act's most important purposes, as described in section 81002(c):

> "(c) Assets and income of public officials which may be materially affected by their official actions should be disclosed and in appropriate circumstances the officials should be disqualified from acting in order that conflicts of interest may be avoided."

Soon after it became law, the First District Court of Appeal reviewed and explained the Act's disclosure provisions as an essential adjunct to the Act's goal of suppressing conflicts of interest in governmental decisionmaking. As described in *Consumers Union of U.S., Inc. v. California Milk Producers Advisory Bd.* (1978) 82 Cal.App. 3d 433, 443:

> "The act seeks to protect all citizens from those who might govern in a financially self-interested manner. Public officials should perform their duties in an impartial manner free from the pressures and bias caused by their own financial interests. (Section 81001, subds. (a) and (b).) To

> implement those goals, the assets and income of public officials which may be materially affected by their official actions must be disclosed. In appropriate circumstances the officials should be disqualified to avoid conflicts of interest. (Section 81002, subd. (d).) To this end the PRA should be liberally construed to accomplish its purposes. (Section 81003.) The PRA seeks to bring a degree of credibility to government by providing that those who hold a public trust must act, and appear to act, ethically. Erosion of confidence in public officials is detrimental to democracy. The election and appointment of ethical public officials depends upon an informed, interested and involved electorate. To maintain confidence and to avoid public skepticism, conflicts of interest must be shunned."

The general provision governing disclosure of income under the Act is section 87207, and Mr. Taylor's request implicates in particular subdivision (b)(2) of the statute, which requires disclosure of:

> "The name of every person from whom the business entity received payments if the filer's pro rata share of gross receipts from that persona was equal to or greater than the thousand dollars ($10,000) during a calendar year."

One year after the *Consumer's Union* decision quoted above, the California Supreme Court reviewed a challenge to section 87207(b)(2) in *Hays v. Wood* (1979), 25 Cal. 3d 772. Plaintiff, an attorney in private practice, had been elected to the Ukiah city council. After he refused to disclose the names of his clients as required under the statute, the city attorney brought suit to compel compliance with the Act.

As pertinent here, the Supreme Court observed that "the Act was not intended to and did not affect or dilute the attorney-client privilege or the attorney's duty to maintain and preserve the confidence of his clients." (*Hays, supra*, 25 Cal.3d at 784, citations omitted.)[2] The court went on to note that:

> "The attorney-client privilege, designed to protect communications between them, does not ordinarily protect the client's identity. A limited exception to this rule has been recognized, however, in cases wherein known facts concerning an attorney's representation of an anonymous client implicate the client in unlawful activities and disclosure of the clients name might serve to make the client the subject of official investigation or expose him to criminal or civil liability." (*Id*. at 785, citations omitted.)

[2] This is, of course, further support for the preceding argument that regulation 18740 should not be read to bar any class of persons from asserting attorney-client privilege in appropriate cases.

The Court acknowledged that the Commission had accurately tracked the law of privilege in its recently adopted regulation 18740, which "provides ample protection against unwarranted infringement of the attorney-client privilege in matters of this kind." (*Ibid*.)[3] Mr. Taylor's exemption request requires us to balance the public interest in disclosure, succinctly described in *Consumer's Union*, against unwarranted infringement of the attorney-client privilege, as described in *Hays*. In short, we must apply regulation 18740 with an eye to harmonizing the disclosure provisions of the Act with the privilege asserted by Mr. Taylor that he not be required to identify certain of his clients.

In full, regulation 18740 provides as follows:

> "An official need not disclose under Government Code Section 87207(b) the name of a person who paid fees or made payments to a business entity if disclosure of the person's name would violate a legally recognized privilege under California law. Such a person's name may be withheld in accordance with the following procedure:
> (a) An official who believes that a person's name is protected by a legally recognized privilege may decline to report the name, but shall file with his Statement of Economic Interests an explanation for such nondisclosure. The explanation shall separately state for each undisclosed person the legal basis for assertion of the privilege and, as specifically as possible without defeating the privilege, facts which demonstrate why the privilege is applicable.
> (b) With respect to each undisclosed person, the official shall state that to the best of his knowledge he has not and will not make, participate in making, or in any way attempt to use his official position to influence a governmental decision when to do so constituted or would constitute a violation of Government Code Section 87100.
> (c) The Executive Director may request further information from the official and, if no legal or factual justification sufficient to support assertion of the privilege is shown, may order that the disclosure required by the Act be made. The official shall, within 14 days after receipt of an order from the Executive Director, either comply with the order or, if he wants to challenge the determination of

[3] Although *Hays* is now 25 years old, it is still the authority for evaluating privilege claims against the demands of the Act and, more generally, it remains the principal authority for the "risk of prosecution" exception that protects client identities in appropriate cases. The Supreme Court also found that section 87207(b), as originally drafted, violated constitutional rights of equal protection because it singled out attorneys and brokers for a lower monetary disclosure threshold, a defect soon repaired by statutory amendment.

the Executive Director appeal the determination, in writing, to the Commission.
(d) If the Executive Director determines that nondisclosure is justified because of the existence of a privilege, the matter shall be referred to the Commission.
(e) The Commission shall review an appeal filed under paragraph (c) or a recommendation made by the Executive Director under paragraph (d) at a meeting held no less than 14 days after notice of the meeting is mailed to the official, the Attorney General and both the district attorney and the city attorney of the jurisdictions in which the official's residence and principal place of business are located. The Commission shall decide whether nondisclosure is warranted by issuing an opinion under Government Code Section 83114 and shall treat the explanation for nondisclosure accompanying the official's Statement of Economic Interests as an opinion request. The procedures set forth in 2 Cal. Code of Regs. Sections 18320-18324, however, shall not apply to opinions issued pursuant to this regulation.
(f) If the Commission orders an official to disclose, the official must comply within 14 days. The Executive Director may, for good cause, extend any of the time periods established in this regulation."

We note at the outset that regulation 18740 permits only "an official" to withhold privileged information, raising as a threshold question whether an unsuccessful candidate is "an official" within the meaning of the regulation. The term "official," as used in this regulation, does not have a self-evident meaning. Its resemblance to the term "public official," defined at section 82048, may suggest an affinity between the terms, but it might just as well call attention to the distinction between them, or it might reflect a simple failure to recognize the resemblance and its potential for confusion. The only certainty is that this regulation avoids the term "public official."

If the "official" referenced here meant "public official" as defined by the Act, the scope of the regulation would be limited to "every member, officer, employee or consultant of a state or local government agency," excluding "candidates" who are not *also* "public officials."[4] But there is nothing in the language of the regulation that compels such a reading. We conclude that the word is ambiguous and inquire further into its meaning in this regulation.

[4] "Public official is defined at section 82048. The essential components of this definition have not been altered since the Act was passed in 1974. The term "candidate," as defined at section 82007, has never required that a person meet the definition of "public official." Thus unsuccessful candidates for elective office, if they are not "public officials" by virtue of other employment, are not "public officials" under the Act.

The drafting history is unhelpful. The first sentence of the present regulation is identical to the language originally adopted by the Commission on July 20, 1976. Our review of the historical record leads us to conclude that the final version of the regulation may well have departed from earlier drafts for reasons other than an intent to deny a legally recognized privilege to those candidates who happened not to be "members, officers, employees or consultants of a state or local government agency."

Since neither the "plain meaning" nor the "legislative history" of regulation 18740 specifies the persons included within the term "official," we must resort to other methods of interpretation to give meaning to this ambiguous term, a meaning which is consistent with the apparent intent of the regulation, which can be harmonized with existing law, and which does not yield a patently absurd result.

The intent of regulation 18740 is clear - to avoid the conflict of laws that would result if the Act's disclosure provisions were read in a manner that would "violate a legally recognized privilege under California law." Under the most restrictive reading, regulation 18740 permits "public officials" to assert such privileges to avoid identifying certain sources of income on their Forms 700. But statutory and common law privileges are not limited to "public officials." The physician-patient and attorney-client privileges, for example, do not require that the physician or attorney enjoy the status of "public official." An unsuccessful candidate for public office, who is not a "public official," can also have these privileges – and be required by law to assert them.[5]

Regulation 18740 would not fully serve its purpose if it failed to allow what other bodies of California law permit and, in many cases, require. Because no other regulation addresses the privilege claims of persons like Taylor, regulation 18740 should be construed if possible to include all persons required to file Form 700s, whether or not they are "public officials."

The principle that exceptions should be construed narrowly does not further the Act's purposes in this case. Under any reading, regulation 18740 acknowledges and accommodates established laws that prohibit certain disclosures on the Form 700. A "narrowing construction" of this regulation simply makes it ineffective, by leaving open a conflict of law in certain cases. And *those* cases may be the very ones of *least* concern under the Act.

As noted earlier, the fundamental reason for the Act's disclosure scheme is to publicize economic interests that might influence the conduct of public business by public officials. The Act requires the same disclosure from candidates who have *no* official position that they might misuse, so that the electorate may have some notice of the candidates' interests and allegiances prior to voting. Yet an unsuccessful candidate who is not a "public official" has no official capacity for mischief, and an abiding interest in disclosure is lessened, with respect to unsuccessful candidates who hold no

[5] Taylor cites his potential liability for wrongful disclosure of taxpayer identities under 26 U.S.C. sections 6103 and 7431. It is not clear that he would ultimately be held liable under these provisions if he acted by order of the Commission. But his exposure to client lawsuits, at the least, is evident.

other position of public trust, once the election is over. Thus under a "narrowing construction" of regulation 18740, it is precisely the person with the least capacity to subvert the integrity of government who is denied the right to assert legally recognized privileges. It would be an absurd result to interpret regulation 18740 as permitting nondisclosure by those with a real capacity to misuse governmental decisionmaking authority, while denying the same right to those without such power.

Finally, in construing the language of a regulation, reference to the governing statute often limits the range of plausible interpretations. Regulation 18740 expressly "interprets" section 87207(b). The terms "official" and "public official" occur nowhere in the statute. The only corresponding term is "filer," the third word in subdivision (b). The scope of the statute is specified in the opening words of subdivision (a) not by a noun, but by the clause "[w]hen income is required to be reported under this article," an expression (like "filer") that plainly applies to *anyone* who files a Form 700.

In short, there seems to be no basis in history, policy, or statute for a construction of regulation 18740 that excludes from its scope an unsuccessful candidate who is not otherwise a "public official." We do not believe that this regulation should be read in a manner that would grant to "public officials" a right to assert privileges against disclosure, while denying the same right to persons who are not even subject to the Act's conflict of interest rules. Accordingly we find that Mr. Taylor may present a claim of attorney-client privilege under regulation 18740.

Having concluded that Mr. Taylor may plead his case for an exemption under regulation 18740, we next turn to the merits of the case he presents. The explanation for nondisclosure originally filed with his Form 700, taken together with the supplementary information provided in response to the Executive Director's request, substantially complied with the requirements of subdivisions (a) through (c) of regulation 18740. On the basis of the information thus provided by Mr. Taylor, the Executive Director concluded that nondisclosure is justified because of the existence of a privilege, and recommended that the Commission issue an opinion to that effect, pursuant to all the requirements of regulation 18740 (d) and (e).

After reviewing the Executive Director's memorandum, along with Mr. Taylor's statements on the factual basis of his exemption request, we concur in the recommendation of the Executive Director, finding that nondisclosure is appropriate under the peculiar circumstances of this case. We must presume that the local U.S Attorney's office is aware that Mr. Taylor's law practice is focused largely on "tax controversies" of a kind that invite investigation or prosecution of clients publicly identified as such. The circumstances of Mr. Taylor and his clients raise precisely the concerns articulated by the California Supreme Court in *Hays v. Wood.* In addition, we note that wrongful disclosure of taxpayer identities is a particular concern of federal statutory law, and that granting this exemption, under the facts before us, creates no risk that undisclosed conflicts of interest might threaten the integrity of governmental decisionmaking. The Executive Director was correct in deciding that the requested exemption was appropriate in this case.

Approved by the Commission on June 25, 2004. Concurring: Chairman Randolph, Commissioners Blair, Downey, Karlan, and Knox.

Liane Randolph
Chairman